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REMOVAL OF TRADE FIXTURES—EXTENSION OF LEASE. *Radey* v. *McCurdy*, 58 Atl. 558 (1904).—The question involved in this case is whether a tenant who has secured a new lease in the nature of an extension of the old lease thereby forfeits his right to trade fixtures erected during the old lease and which he could have removed during that term.

This point has come up in a number of jurisdictions, and the decisions of some of the different states are not reconcilable. One line of cases holds that the tenant, by accepting a new lease, in which no mention is made of trade fixtures erected during the old lease, thereby abandons his right to them. It was within his power to except them from the lease, and not having done so he is presumed to have leased from the landlord everything on the premises. Whereas, the cases on the other side hold that the tenant does not lose his right to remove the trade fixtures, as his occupation has been continuous and therefore no presumption of an intention to abandon them to

the landlord can arise. There was no need to except from the lease what unquestionably belonged to the tenant.

The case of *Radey* v. *McCurdy*, 58 Atl. 558, decided by the Supreme Court of Pennsylvania in 1904, was a case in which premises were leased to McCurdy Brothers for the term of ten years. The firm of McCurdy Brothers consisted of James and John McCurdy. During the term James bought all of John's interest in the business. Three months before the expiration of the lease a new lease of the said premises was executed to McCurdy Brothers, consisting of James and Samuel, another brother. This was said to be "an extended and renewed lease." Before the expiration of the second lease the lessees started to remove trade fixtures erected by them during the old lease. The lessors filed a bill to restrain their removal. The court in refusing to grant the injunction said in part: "They [trade fixtures] are not put in for the benefit of the landlord, and until the tenant leaves them on the premises in which he no longer has any interest, no intention can be imputed to abandon them to his lessor. . . . Abandonment being a question of intention, it cannot be that under the undisputed facts in this case the lessees ever intended to or did abandon their trade fixtures." This doctrine is in accord with the case of *Devin* v. *Dougherty*, 27 How. Pr. (N. Y.) 461, where under a similar state of facts it was argued that the tenant lost his right to fixtures, for, since no mention was made of them in the second lease, he therefore rented everything on the premises, and is estopped from denying his landlord's title to them; but the court in that case said: "As the new lease was intended merely to provide for a further occupancy of the premises, and that for the same purpose, I see not why it was necessary for the tenant to reserve in it any rights in regard to a thing which was his, and which it must have been understood he was to continue to use as his own during his new term. He hired for a second time his landlord's premises; but how can that be said to be also a hiring of property, upon these premises, which belonged to himself and which as yet he had a right to use upon those premises under a lease still in force?"

The best known case on the other side of this question is *Loughram* v. *Ross*, 45 N. Y. 792 (1871), in which the court said: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy and not under the old, and the rights which existed under the former tenancy and which are not claimed or exercised are abandoned as

effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises." This case has been followed in New York and a number of other states. *Lewis* v. *O. N. and P. Co.*, 125 N. Y. 341; *Talbot* v. *Cruger*, 151 N. Y. 117; *Watriss* v. *Bank*, 124 Mass. 571; *Sanitary District of Chicago* v. *Cook*, 169 Ill. 184. It was referred to in *Kerr* v. *Kingsbury*, 39 Mich. 150 (1878), where the court in an opinion by Justice Cooley, in refusing to follow it, said: "This is perfectly true if the lease includes the buildings, but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable."

This extract from Justice Cooley's opinion seems to me to show the fallacy on which the New York decision is based. Why an intention of an abandonment is presumed it is impossible to see. The presumption of an abandonment is a fiction of the law which grew up in the cases where a tenant, at the expiration of his lease, left without removing his trade fixtures. On the grounds of public policy, to protect the landlord or his new tenant, who took the premises as they stood, from being disturbed in their possession by the old tenant claiming what he left on the premises, the courts refused to allow the old tenant to take his fixtures. They therefore said, "We will presume that the tenant intended to make a gift of the fixtures to his landlord." The courts have not extended this doctrine any further than the class of cases it was intended to remedy. Thus where a tenant holds over after the expiration of his lease, his right to remove fixtures remains until he surrenders possession to the landlord. "It would seem that the reason upon which the courts have based the rule that the tenant cannot re-enter and remove his fixtures after surrender of the possession under his lease is, that such surrender is presumed to be intended either as a gift of the fixtures to the landlord, or if not a gift, a waiver of any right to re-enter and remove them. It becomes therefore to some extent a question as to the intention of the parties; and when the evidence clearly shows there was no intention on the part of the tenant to relinquish his unquestioned right to the fixtures, and there is also evidence showing that the landlord understood such intention and acquiesced therein by promising him that he might remove them after the surrender, the right is not lost." *Bank* v. *Merrill Co.*, 69 Wis. 501 (1887). Why the right is not lost in this case, but is lost in the case of a renewal, it is difficult to understand. Surely a renewal of the lease shows a manifest intention

not to abandon them to the landlord. Tyler on Fixtures, page 443, says: "The doctrine is that a tenant holding over after the expiration of the term is presumed to continue in occupation of the demised premises upon the same terms as under the original lease; and hence in such a case the tenant is not estopped from claiming his fixtures, as in the case of an express new lease, upon an actual or implied surrender of possession of the premises under the old one." He gives no reason why there should be a difference, and it is difficult to see why there should be. In the first case there is an implied renewal of the lease and in the second an express renewal. Justice Cooley in *Kerr* v. *Kingsbury, supra,* in discussing the difference between a tenant "holding over" and one who secures a renewal says: "A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove the fixtures during the term: indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession and during the time that he has a right to regard himself as occupying in the character of a tenant. But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of the lease is not apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal, 'If you will be at the expense and trouble and incur the loss of removing your erections during the term and of afterwards bringing them back again, they shall be yours, otherwise you will be deemed to abandon them to your landlord.'"

If the rule as laid down in *Loughram* v. *Ross, supra,* were followed, in almost every case tenants would be deprived of their fixtures with absolutely no intention to part with them. Under the New York decision, in order to save his fixtures he must do one of two things—viz., either have his landlord except them from the lease, or remove them one day and bring them back the next. The latter would be a needless waste of money. In regard to the former, no matter how careful a tenant is, he would not consider it necessary to have his landlord except from the lease that which is the tenant's own property. On the other hand, the decision of *Radey* v. *McCurdy, supra,* seems to be a perfectly sound doctrine. It is difficult to conceive of a case in which any hardship would result from its application. G. S.